Office-Supreme Court, U.S.
FILED
JUN 26 1981
Clerk

80-2194

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CROATAN BOOKS, INC.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

ROGER C. SPAEDER
ROGER E. ZUCKERMAN
RONALD R. MASSUMI

ZUCKERMAN, SPAEDER, TAYLOR & KOLKER
1800 M Street, N.W.
Suite 375 North
Washington, D.C. 20036
202/223-8606

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Whether a jury forced to view allegedly obscene films two or three at a time can properly apply the test for obscenity and evaluate each film "as a whole?"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

CROATAN BOOKS, INC.,[1]
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.[2]

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

OPINIONS DELIVERED BELOW

The judgment of the Circuit Court of Fairfax County appears in the appendix hereto. The order of the Virginia Supreme Court, dated April 27, 1981, declining to issue a writ of certiorari to the Circuit Court of Fairfax appears in the appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

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[1] Statement pursuant to Rule 28.1 of the Rules of the United States Supreme Court, as amended October 21, 1980: Counsel in this case have been advised that Croatan Books, Inc., has no present corporation, no subsidiary corporations, and no affiliates.

[2] Caption lists all parties.

CONSTITUTIONAL PROVISIONS INVOLVED

The fourteenth amendment to the United States Constitution, which provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law.

The first amendment to the United States Constitution, which provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

STATEMENT OF THE CASE

Petitioner Croatan Books, Inc., is engaged in the sale and rental of sexually oriented films, books and magazines at a store located in Fairfax County, Virginia. The indictment in this case charged Croatan with possessing with intent to rent ten allegedly obscene films. The films in question were "shorts" designed to be viewed by customers individually in private projection booths. The offenses were charged as felonies under the provisions of a Virginia repeat offenders statute.

Prior to trial Croatan entered pleas of guilty as to two of the ten films. The remaining counts were tried before a twelve-member jury in the Circuit Court of Fairfax County. The trial judge adopted, over Croatan's objections, a procedure he had imposed previously in a similar trial involving the same defendant. Three separate projectors were set up and the films screened *simultaneously* on a blank wall in groups of three, three and two. The jury ultimately returned verdicts of guilty on all eight films and recommended the maximum fine of $1,000 per film. On August 8, 1980, the court entered judgment and imposed the penalty recommended by the jury.

REASONS FOR ALLOWING THE WRIT

A Jury Forced to View Two or Three Films at a Time Cannot Evaluate Each Film in Conformity with the Constitutional Test for Obscenity

The question presented is a persistent one, the same as that recently raised in another case before this Court and involving the same parties, *Croatan Books, Inc.* v. *Commonwealth of Virginia, cert. denied,* June 22, 1981 (No. 80-1601). The recurrent use of a trial procedure violative of basic constitutional principles underscores the need for review by this Court. In this case the sole contested issue at trial was whether the eight films appealed to a "prurient interest" in sex. Croatan introduced the extensive expert testimony of Dr. Lawrence Donner, a psychologist specializing in the study of sexual behavior and associate professor of clinical psychology at the University of Maryland School of Medicine. Dr. Donner testified that in his opinion none of the films appealed to a "prurient," i.e., a sick, morbid or shameful interest in sex, but rather appealed to a normal and healthy erotic interest in sex. Croatan also presented the testimony of two experts who together conducted a survey of community attitudes towards sex and sexually explicit materials. The Commonwealth offered the testimony of lay witnesses from the community.

In determining whether the dominant theme or purpose of a film is an appeal to the prurient interest, a jury must consider the film as a whole and not base its judgment on isolated portions or scenes. *Miller* v. *California,* 413 U.S. 15, 24 (1973). In the landmark case of *Roth* v. *United States,* 354 U.S. 476, 489 (1957), this Court disposed of the notion that obscenity can be judged on the basis of isolated excerpts and held that the determination of obscenity must proceed from a considera-

tion of the material "taken as a whole." The current standard for obscenity, the so-called "*Miller* test," examines

> (a) whether "the average person, applying contemporary community standards" would find that the work, *taken as a whole*, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work *taken as a whole*, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (emphasis added).

An isolated segment of a film, book or magazine cannot constitutionally provide either probable cause for an obscenity arrest [3] or the foundation for an obscenity conviction.[4] When the obscenity of a motion picture is in issue, the factfinder must view the entire film in order

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[3] *See United States* v. *Tupler*, 564 F.2d 1294, 1297 (9th Cir. 1977); *Hosey* v. *City of Jackson*, 309 F. Supp. 527, 534 (S.D. Miss. 1970), *vacated on other grounds*, 401 U.S. 987 (1971); *Cambist Films, Inc.* v. *Duggan*, 298 F. Supp. 1148, 1152 (W.D. Pa.), *rev'd on other grounds*, 420 F.2d 687 (3d Cir. 1969); *Hanley* v. *State*, 479 P.2d 486, 493 (Alaska 1970).

[4] *See, e.g., Playboy Publications, Inc.* v. *McAuliffe*, 610 F.2d 1354, 1369 (5th Cir.), cert. dismissed, —— U.S. ——, 100 S. Ct. 3031, 65 L. Ed. 2d 1131 (1980) (while certain parts of a magazine if considered separately would be obscene, the magazine may turn out to be not obscene when considered as a whole); *In re Louisiana News Co.*, 187 F. Supp. 241, 246 (E.D. La. 1960) (one objectionable picture cannot render entire publication obscene); *People* v. *New Horizons, Inc.*, —— Colo. ——, 616 P.2d 106 (Colo. 1980) (statute unconstitutional which would allow magazine consisting of words and pictures to be declared obscene on the basis of the pictures alone without reference to text or accompanying articles).

to make a proper determination.[5] Failure to do so must vitiate the finding of obscenity.[6]

In this case, Croatan focused its entire argument upon the first prong of the *Miller* test, seeking to establish in the minds of the jury a determination between material which appeals to a "prurient" interest in sex and that which appeals merely to the perfectly normal, healthy erotic interest in sex. That is a discrimination subtle enough to challenge a jury's determination even in the best of circumstances. It is too much to expect that any jury confronted with up to *three films* projected *simultaneously* upon the courtroom wall can somehow perceive each "as a whole," fix each in mind and memory, and then accurately sort through the afternoon's jumble of cinematic impressions in order to separate the obscene from the protected.

The simultaneous screening forced the jurors to turn from film to film, able to concentrate on only a portion of each at a time or perhaps, when attention waned, to let vision fall passively upon some of the three. Whatever the case, it is plain that no juror could have viewed all of every film, and therefore none could judge each film as a whole.

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[5] *See Haldeman* v. *United States*, 340 F.2d 59, 62 (10th Cir. 1965); *Zenith International Film Corp.* v. *City of Chicago*, 291 F.2d 785, 789 (7th Cir. 1961); *United States* v. *West Coast News Co.*, 228 F. Supp. 171, 178 (W.D. Mich. 1964), *aff'd*, 357 F.2d 855 (6th Cir. 1966), *rev'd on other grounds sub nom. Aday* v. *United States*, 388 U.S. 447 (1967); *Bourland* v. *State*, 502 S.W. 2d 8, 9 (Tex. Crim. App. 1973); *Bryers* v. *State*, 480 S.W. 2d 712, 717-19 (Tex. Crim. App. 1972); *McKinney* v. *Tuscaloosa*, 268 So. 2d 488, 492 (Ala. 1972).

[6] For example, in *Zenith International Film Corp.* v. *City of Chicago*, 291 F.2d 785, 789 (9th Cir. 1961), the court overturned an obscenity conviction where the factfinder "failed to view the film as a whole and thus could under no circumstances apply the proper standard of obscenity."

In light of *Roth* and *Miller*, there is simply no alternative to viewing each film in its entirety and judging each as an integral whole. The procedure adopted here undermines a basic tenet of first amendment jurisprudence namely: that a work is obscene, if at all, by virtue of its entire content, not by virtue of some particular, isolated part. To permit, as here, a trial court to impose a procedure which precludes any possibility that disputed films can be judged in their entirety would be, in practical effect, to sanction a return to the days of *Regina* v. *Hicklin*, L.R. 3, Q.B. 360 (1868), when it was thought proper to judge obscenity by viewing only isolated excerpts of a work. To protect the vitality of the *Roth-Miller* approach and to assure that trial courts exercise utmost vigilance in assuring that trial procedures do not undermine the most basic principle of those seminal cases, the requested writ should issue.

Respectfully submitted,

ROGER C. SPAEDER
ROGER E. ZUCKERMAN
RONALD R. MASSUMI

ZUCKERMAN, SPAEDER, TAYLOR
& KOLKER
1800 M Street, N.W.
Suite 375 North
Washington, D.C. 20036
202/223-8606
Counsel for Petitioner

APPENDIX

APPENDIX

CONTENTS OF APPENDIX

As an aid to the Court, the contents of this Appendix are set forth as follows:

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 27th day of April, 1981.

CROATAN BOOKS, INC.,
Appellant,

against

COMMONWEALTH OF VIRGINIA,
Appellee.

Record No. 801992

Circuit Court No. C-30933

From the Circuit Court of Fairfax County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

ALLEN L. LUCY
Clerk

By: /s/ [Illegible]
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

#30933

COMMONWEALTH OF VIRGINIA

vs.

CROATAN BOOKS, INC.

Indictment—Possession with intent to rent an obscene film (8 Counts)

This 8th day of August, 1980, came the Commonwealth, by her Attorney, and the Defendant, CROATAN BOOKS, INC. by its Counsel, Roger Zuckerman and Richard Stanley.

Thereupon, the Court Reporter was sworn.

This case came on this day on the Defendant's motion to set aside verdicts and for a new trial and for imposition of sentence.

Whereupon, the Court denied the Defendant's motion to set aside verdicts and for a new trial.

Whereupon, the Court imposed the following sentences:

Count I	Red Patterned Dress	$1,000.00 fine plus costs
Count III	Lip Love is Wet	$1,000.00 fine plus costs
Count IV	Around the World	$1,000.00 fine plus costs
Count V	Disco Lover	$1,000.00 fine plus costs
Count VII	Big Tease	$1,000.00 fine plus costs
Count VIII	Sensitive Asshole	$1,000.00 fine plus costs
Count IX	Sexy Plant Doctor	$1,000.00 fine plus costs
Count X	Anal Nymph	$1,000.00 fine plus costs

/s/ [Illegible]
Judge

[SEAL]

A COPY TESTE:
JAMES E. HOOFNAGLE
Clerk

By: /s/ Karen L. Marshall
Deputy Clerk

Office - Supreme Court, U.S.
FILED
OCT 2 1981
ALEXANDER L. STEVAS,
CLERK

DOCKET NO. 80-2194

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CROATAN BOOKS, INC.,
Petitioner

v.

COMMONWEALTH OF VIRGINIA
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

JAMES F. HURD, JR.
Assistant Commonwealth's Attorney
Fairfax County Courthouse
4000 Chain Bridge Road
Fairfax, Virginia 22030
Attorney for Respondent
COMMONWEALTH OF VIRGINIA
703/691-2776

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-2194

CROATAN BOOKS, INC.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The Commonwealth of Virginia, the Respondent, prays that the Petition for Writ of Certiorari be denied.

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STATEMENT OF THE CASE

Respondent is in substantial agreement with Petitioner's Statement of the Case. However, the record of trial (dated June 16, 1980) reflects other matters bearing on the question presented.

Prior to viewing the film in question, the trial court gave the following instruction to the jury:

> It is important that you consider each film in its entirety. You must consider each film as a whole. In the event that at any time you are unable to do this, then I ask that you simply bring it to the Court's attention. If at any time the procedure is difficult to follow, just simply raise your hand and let the court know that, but it's important that you consider each film on its own merits and that you consider each film as a whole. (Page 6).

A similar instruction was given at the close of the evidence. (Pages 205-6).

Each film was shown in its entirety and was introduced into evidence. Adjustments in the location of projectors were

made during the presentation at Petitioner's request. (Page 8).

The transcript reflects that certain persons viewed the films along with the jury, and subsequently testified regarding community standards. Ms. Lenor Binzer and Mr. DeForrest Z. Rathbone, Jr., testified for the Commonwealth, and upon cross-examination were questionned about the contents of the films. Specific reference was made by Petitioner's Counsel to the film, "Sexy Plant Doctor". See pages 17-20 and 46-48. Similarly, Dr. Lawrence Donner testified in behalf of Petitioner after viewing the films along with the jury and was examined on their content. See pages 73-76.

ARGUMENT

THE MANNER OF PRESENTING THE FILMS DID NOT PREVENT A PROPER EVALUATION OF THEIR CONTENT.

It is of primary importance to accurately characterize the nature of the viewing procedure complained of here, so as to distinguish this case on its facts from those cited by Petitioner. While two or three films were shown simultaneously, the record of trial reflects that each film was shown to the jury in its entirety and that each film was introduced into evidence. Respondent did not rely on isolated film segments, as in, e.g., Zenith International Film Corp. v. City of Chicago, 291 F.2d 785 (7th Cir. 1961), and McKinney v. Tuscaloosa, 268 So.2d 488 (Ala. 1972), or on still photographs, as in, e.g., Bourland v. State, 502 S.W.2d 8 (Tex. Crim. App. 1973) and Bryers v.

State, 480 S.W.2d 712 (Tex. Crim. App. (1973). Consequently, there is no violation of the viewing standards set forth in Miller v. California, 413 U.S. 15 (1973) and Roth v. United States, 354 U.S. 476 (1957).

Petitioner would nonetheless have this Court impose an entirely new and different standard of review based on nothing more than the imagined physical limitations of the jurors who witnessed the films. No such limitations are evident from the record of trial and may not be presumed. The manner in which the films were shown allowed each juror to view each film in its entirety, and adjustments were made to Petitioner's apparent satisfaction. Prior to viewing, the trial judge instructed the jury as to the importance of viewing each film in its entirety, and provided guidance as to how

the court could be notified in the event that procedure became difficult to follow. No such notice was ever given by any juror.

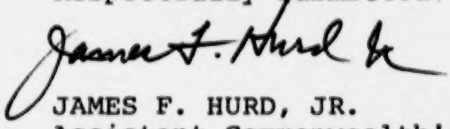
The record of trial further reflects that two Commonwealth witnesses, on cross-examination, and one witness for Petitioner were able to answer specific questions regarding what they had seen, after viewing the films along with the jury. There is no basis on which to conclude that the jurors were any less observant.

The question presented for review was previously raised in this Court in Croatan Books, Inc. v. Commonwealth of Virginia, cert. denied, June 22, 1981 (No. 80-1601). The method of presentation of the evidence in that case was identical to that in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted.



JAMES F. HURD, JR.
Assistant Commonwealth's Attorney
4000 Chain Bridge Road
Fairfax, Virginia 22030
Attorney for Respondent
Commonwealth of Virginia